

APPEAL NO. 021419  
FILED JULY 15, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 29, 2002. The hearing officer determined that the respondent (claimant) is entitled to lifetime income benefits (LIBs) as a result of the \_\_\_\_\_ compensable injury. The appellant (carrier) appeals the determination on sufficiency of the evidence grounds. The claimant urges affirmance.

DECISION

Affirmed.

We first address the carrier's assertion that the hearing officer erred in excluding a medical report and testimony from the carrier's peer review doctor, Dr. W. Although not timely exchanged, the carrier asserted good cause for the admission of such evidence, in that the medical report was not created until after the 15-day exchange period and Dr. W had not been previously identified as a potential witness. The carrier indicated, however, that it first contacted Dr. W more than four and one-half months after the benefit review conference in this proceeding. Given this delay, the hearing officer found no good cause for the untimely exchange and excluded the evidence. We cannot conclude that the hearing officer's determination was an abuse of discretion. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

The hearing officer did not err in determining that the claimant is entitled to LIBs as a result of the compensable injury of \_\_\_\_\_. At issue is whether the claimant is entitled to LIBs under Section 408.161(a)(2) and (3) for the permanent and total loss of use of both feet at or above the ankle and both hands at or above the wrist. We have said that the test for total loss of use is whether the member possesses any substantial utility as a member of the body or whether the condition of the injured member is such that it keeps the claimant from getting and keeping employment requiring the use of the member. Texas Workers' Compensation Commission Appeal No. 94689, decided July 8, 1994, citing Travelers Ins. Co. v. Seabolt, 361 S.W.2d 204, 206 (Tex. 1962). The question of whether a claimant suffered a permanent and total loss of use of a member is generally a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In view of the evidence presented, we cannot conclude that the hearing officer's determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). That another fact finder may have drawn different inference from the evidence does not afford us a basis to reverse the hearing officer.

The carrier asserts error in the hearing officer's failure to make specific findings that the claimant's loss of use of his hands and feet is "permanent." We have said that a "total loss of use" of a body part must be permanent under the 1989 Act. See Texas Workers' Compensation Commission Appeal No. 941231, decided October 20, 1994., referencing Section 408.161(b). Although the hearing officer did not make an underlying finding of fact that the loss suffered by the claimant was "permanent," we conclude that the evidence would support such a finding and that such finding is implied in the determination of entitlement to LIBs. In future cases, the hearing officer should make findings of fact which track the wording of Section 408.161.

The decision and order of the hearing officer are affirmed.

The true corporate name of the carrier is **CONNECTICUT INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICES COMPANY  
800 BRAZOS STREET  
AUSTIN, TEXAS 78701.**

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Philip F. O'Neill  
Appeals Judge

CONCUR:

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Judy L.S. Barnes  
Appeals Judge

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Elaine M. Chaney  
Appeals Judge